



U.S. Department of Justice

Immigration and Naturalization Service

H4

OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



FILE

Office: Panama

Date:

SEP 11 2000

IN RE: Applicant:

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under §  
212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C.  
1182(a)(9)(B)(v)

IN BEHALF OF APPLICANT: Self-represented

Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

Terrance M. O'Leary, Director  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Officer in Charge, Panama, Panama, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Colombia who was found to be inadmissible to the United States by a consular officer under § 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act, (the Act), 8 U.S.C. 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for a period of more than 1 year. The applicant married a citizen of the United States in May 1995 in New York and is the beneficiary of an approved petition for alien relative. The applicant seeks the above waiver in order to return to the United States and reside with his spouse.

The officer in charge determined that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the application accordingly.

On appeal, the applicant states that he has been married to his wife for nearly five years and she will be subject to extreme hardship due to physical separation. The applicant states that his wife is very depressed and feels lonely without him.

The record reflects that the applicant was present in the United States without a lawful admission or parole in 1981 and remained until 1984. He was unlawfully present without a lawful admission or parole again in 1988 and he remained until October 29, 1998. The applicant indicates that he had been previously removed from the United States on an unspecified date and he was granted permission to reapply for admission on June 19, 1997. The record indicates that he was arrested by the Border Patrol on August 11, 1988 but there is no additional information in the present temporary file to deduce what actually transpired then or to determine the reason for his departure in 1984. The transcript of the interview by the consular officer fails to add any information to the matter.

**Section 212(a)(9)(B) ALIENS UNLAWFULLY PRESENT.-**

(i) **IN GENERAL.**-Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to § 244(e) [1254]) prior to the commencement of proceedings under § 235(b)(1) or § 240 [1229a], and again seeks admission within 3 years of the date of such alien's departure or removal, is inadmissible.

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the

date of such alien's departure or removal from the United States, is inadmissible.

(iii) EXCEPTIONS.-

(I) MINORS.-No period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

Section 212(a)(9)(B) ALIENS UNLAWFULLY PRESENT.-

(v) WAIVER.-The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

Section 212(a)(9)(B) of the Act was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). An appeal must be decided according to the law as it exists on the date it is before the appellate body. See Bradley v. Richmond School Board, 416 U.S. 696, 710-1 (1974); Matter of Soriano, Interim Decision 3289 (BIA 1996). In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. Matter of George, 11 I&N Dec. 419 (BIA 1965); Matter of Leveque, 12 I&N Dec. 633 (BIA 1968).

After reviewing the IIRIRA amendments to the Act relating to fraud, misrepresentation and unlawful presence in the United States, and after noting the increased penalties Congress has placed on such activities, including the narrowing of the parameters for eligibility, the re-inclusion of the perpetual bar in some instances, eliminating children as a consideration in determining the presence of extreme hardship, and providing a ground inadmissibility for unlawful presence (entry without inspection) after April 1, 1997, it is concluded that Congress has placed a high priority on reducing and/or stopping fraud, misrepresentation and unlawful presence of aliens in the United States.

The Board has held that extreme hardship is not a definable term of fixed and inflexible meaning, and that the elements to establish

extreme hardship are dependent upon the facts and circumstances of each case. These factors should be viewed in light of the Board's statement that a restrictive view of extreme hardship is not mandated either by the Supreme Court or by its own case law. See Matter of L-O-G-, Interim Decision 3281 (BIA 1996).

It is noted that the requirements to establish extreme hardship in the present waiver proceedings under § 212(a)(9)(B)(v) of the Act do not include a showing of hardship to the alien as did former cases involving suspension of deportation or present cases involving battered spouses. Present waiver proceedings require a showing of extreme hardship to the citizen or lawfully resident spouse or parent of such alien. This requirement is identical to the extreme hardship requirement stipulated in the amended fraud waiver proceedings under § 212(i) of the Act, 8 U.S.C. 1182(i). Therefore, it is deemed to be more appropriate to apply the meaning of the term "extreme hardship" as it is used in fraud waiver proceedings than to apply the meaning as it was used in former suspension of deportation cases.

In Matter of Cervantes-Gonzalez, Interim Decision 3380 (BIA 1999), the Board recently stipulated that the factors deemed relevant in determining whether an alien has established "extreme hardship" in waiver proceedings under § 212(i) of the Act include, but are not limited to, the following: (1) the presence of a lawful permanent resident or United States citizen spouse or parent in this country; (2) the qualifying relative's family ties outside the United States; (3) the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; (4) the financial impact of departure from this country; (5) and finally, significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

It is also noted that the Ninth Circuit Court of Appeals in Carnalla-Muñoz v. INS, 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity (referred to as an after-acquired family tie in Matter of Tijam, Interim Decision 3372 (BIA 1998) need not be accorded great weight by the district director in considering discretionary weight. The applicant in the present matter entered the United States unlawfully in 1988, married his spouse in May 1995, worked without Service authorization for several years and remained without Service authorization until October 1998. He now seeks relief based on that after-acquired equity. However, as previously noted, a consideration of the Attorney General's discretion is applicable only after extreme hardship has been established.

The assertion of financial hardship to the applicant's spouse advanced in the record during his immigrant visa application interview is contradicted by the fact that, pursuant to § 213A of the Act, 8 U.S.C. 1183a, and the regulations at 8 C.F.R. 213a, the person who files an application for an immigrant visa or for adjustment of status on or after December 19, 1997 must execute a

Form I-864 (Affidavit of Support) which is legally enforceable in behalf of a beneficiary (the applicant) who is an immediate relative or a family-sponsored immigrant when an applicant applies for an immigrant visa. The statute and the regulations do not provide for an alien beneficiary to execute an affidavit of support in behalf of a U.S. citizen or resident alien petitioner. Since the petition for alien relative was filed on October 9, 1997, and the applicant was interviewed by a consular officer on November 4, 1998, Service regulations require that certain specific financial records be submitted with the application for immigrant visa or the application for adjustment of status. The present record fails to contain any such financial documentation or Form I-864 for the Associate Commissioner to review. Claims that an alien beneficiary is needed for the purpose of supporting a citizen or resident alien petitioner can only be considered as a hardship in rare instances.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has failed to show that the qualifying relative would suffer extreme hardship over and above the normal economic and social disruptions involved in the removal of a family member. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under § 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. See Matter of T--S--Y--, 7 I&N Dec. 582 (BIA 1957). Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.